◦ THE HON'BLE SRI JUSTICE BILAL NAZKI

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AND

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THE HON'BLE SRI JUSTICE G.CHANDRAIAH

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+ W.P.NO. 2699 OF 2006

% Dated 9.6.2006

Fenoplast Ltd.

….Petitioner

Vs.

$ The Asst. Commissioner of Central Excise, Hyderabad and another

….Respondents

! Counsel for petitioner: Mr. S.R.Ashok for S. Bharath Kumar

^Counsel for Respondents: Mr. A. Rajasekar Reddy, Asst. Solitor General,

<GIST:

> HEAD NOTE:

? Cases referred

1. (2005) 5 Supreme Court Cases 337
2. (2004) 5 SCC 263
3. (2005) 3 SCC 409
4. 2001 (134) E.L.T. 14 (P & H)

HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE G.CHANDRAIAH

W.P.NO. 2699 OF 2006

Dt. 9.6.2006

Between:

Fenoplast Ltd.

…Petitioner

and

The Assistant Commissioner of Central Excise, Hyderabad and another

…Respondents

HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE G.CHANDRAIAH

W.P.NO. 2699 OF 2006

ORDER: (Per Hon'ble Mr. Justice Bilal Nazki)

The petitioner company is a manufacturer of rigid PVC film and sheets. The product falls under chapter sub-heading 39291011. The petitioner was availing the facility of payment of Central Excise Duty in monthly instalments under the provisions of Rule 8 of Central Excise Rules 2002. According to the petitioner, as per the said Rules the duty on the goods removed during the month shall be paid by the 5th day of the following month except in the month of March during which the duty shall be paid by the 31st of March. The petitioner company is a 30 year old manufacturing establishment and it has not been a defaulter at any point of time in the payment of excise duty or any other taxes. A statement of excise duty paid during the year 2005-06 has been annexed to the writ petition, which, according to the petitioner, shows that the company has been paying the duty regularly within the stipulated time. However, in so far as the payment of duty for the month of September was concerned, it was paid on 5th of November, 2005 instead of paying it before 5th of November, 2005 and according to the petitioner, this mistake was committed unintentionally by the company staff as they did not notice an amendment which was brought in Central Excise Rules 2002 wherein Sub-Rule 3 (A) was added to Rule 8 with effect from 1st April, 2005. By this amendment, forfeiture of the facility was prescribed if the payment of the duty by the due date was not discharged within 30 days. Earlier to this amendment, instead of 30 days it used to be one month and the petitioner company could not realize the difference between one month and 30 days, therefore there was a delay of one day in remitting the amount. Thereafter the petitioner company paid

duty regularly within time. On 2.2.2006 the 1st respondent passed an order inter alia forfeiting the facility given to the petitioner company to pay the duty in monthly instalments under Sub Rule 1 of Rule 8 of Central Excise Rules 2002 for a period of two months from the date of communication of the said order which was communicated to the petitioner company on 3.3.2006. The order also contemplated that during the said two months period the assessee shall pay the duty for each consignment by debiting to the current account i.e., PLA and shall not avail CENVAT Credit during the said period. This order has been challenged by this writ petition.

While arguing the matter, the learned counsel for the petitioner has not denied that the petitioner has been a defaulter. The only ground agitated was that before passing of the impugned order no notice was given and it is in violation of rules of natural justice.

In the counter affidavit it has been stated that in fact that there was no amendment in Rule 8 of Central Excise Rules, 2002 to the effect that one month was changed into thirty days. It was altogether in a different context that such change was made. The Rule, before amendment and after amendment, is reproduced below,

"PRE-AMENDED RULE 8 OF CENTRAL EXCISE RULES, 2002

Rules 8: Manner of payment of duty.

1. The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 5th day of the following month;

Provided that in case of goods removed during the month of March, the duty shall be paid by the 31st day of March;

Provided further that where an assessee is availing of the exemption under a notification based on the value

of clearances in a financial year, the duty on goods cleared during a calendar month shall be paid by the 15th day of the following month except in case of goods removed during the month of March for which the duty shall be paid by the 31st day of March.

Explanation- For the purposes of this rule,

a. the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date:

b. if the assessee deposits the duty by cheque, the date of presentation of the cheque in the bank designated by the Central Board of Excise and Customs for this purpose shall be deemed to be the date on which the duty has been paid subject to realization of that cheque.

(IA) Notwithstanding anything contained in sub-rule (1), the duty on the goods removed from the factory or the warehouse, in the State of Gujarat, during the second fortnight of February, 2002 and the month of March, 2002 shall be paid by the 31st March, 2002;

Provided that where an assessee in the State of Gujarat is availing of the exemption under a notification based on the value of clearances in a financial year, the duty on goods cleared during the month of February, 2002 shall be paid by the 31st March, 2002.

Explanation- For removal of doubts, it is hereby clarified that the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.

2. The duty of excise shall be deemed to have been paid for the purposes of these rules on the excisable goods removed in the manner provided under sub-rule (1) and the credit of such duty allowed, as provided by or under any rule.

3. If the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with an interest at the rate of two per cent per month or rupees one thousand per day, whichever is higher, for the period starting with the first day after due date till the date of actual payment of the outstanding amount;

Provided that the total amount of interest payable in terms of this sub-rule shall not exceed the amount of duty which has not been paid by due date:

Provided further that till such time the amount of duty outstanding and the interest payable thereon are not paid, it shall be deemed that the goods in question in respect of which the duty and interest are outstanding, have been cleared without payment of duty and the consequences and the penalties as provided in these rules shall follow.

Illustration 1. - X, an assessee, fails to pay excise duty of Rs.31 lakhs payable on the goods cleared in February, by the 5th of March. X pays the amount on 10th of March. The default has continued for 5 days. The interest payable by X is computed as follows:-

2% of the amount of lakhs x 5/31 (A) = 2% of Rs. 31 = Rs. 10000 -

default for 5 days

Rs. 1000 per day of default (B) = 5 x Rs.1000 = Rs. 5000 -

The interest payable is the higher of the amounts (A) and (B).

Illustration 2, - Y, an assessee, was liable to pay an excise duty of Rs.5 lakhs payable on the goods cleared in June.

Y pays only Rs.4 lakhs by the 5th of July. Thus Y has defaulted in respect of Rs. 1 lakh. Y pays the balance amount on 30th of July. The default is for 25 days. The interest payable by Y is computed as follows:-

2% of the = 2% of Rs. = Rs.1613 -

amount of 100000 x 25/31

default for 25 days (A)

Rs.1000 per = 25 x Rs.1000 = Rs.25000 -

day of default (B)

The interest payable is the higher of the amounts (A) and (B).

Illustration 3.- C, an assessee availing the SSI exemption scheme, fails to pay excise duty of Rs.10000 payable on the goods cleared in May, by the 15th of June. C pays the amount on 20th of August. The default is for 2 months and 5 days. The interest payable by C is computed as follows:-

2% per = 2% of Rs.10000 = Rs.432 -

month of the x (2+5/31)

amount of (A)

default

Rs.1000 per = (30+31+5) x Rs. = Rs. 66000 -

Day of 1000 (B)

default

The interest payable is the higher of the amounts (A) and (B) subject to a maximum of the amount of default = Rs.10000.

4. The provisions of section 11 of the Act shall be applicable for recovery of the duty as assessed under rule 6 and the interest under sub-rule (3) in the same manner as they are applicable for recovery of any duty or other sums payable to the Central Government.

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AMENED RULE 8 OF CENTRAL EXCISE RULES, 2002

Notification No. 17/2005- Central Excise (N.T.) Dated the 31st March, 2005

In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944), the Central Government, hereby makes the following rules further to amend the Central Excise Rules, 2002, namely

1. (1) These rules may be called the Central Excise (Second Amendment) Rules, 2005.

(2) They shall come into force on and from 1st April 2005.

2. In the Central Excise Rules, 2002 (hereinafter referred to as the said rules), in rule 8,-

A. for sub-rule (3), and the proviso and the illustrations thereto, the following shall be substituted namely:-

"(3) If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount."

(B) after sub-rule (3) so substituted, the following sub-rule shall be inserted, namely:-

"(3A) If the assessee defaults in payment of duty by the date prescribed in sub-rule (2) and the same is

> discharged beyond a period of thirty days from the said date, then the assessee shall forfeit the facility to pay the duty in monthly instalments under sub-rule (1) for a period of two months, starting from the date of communication of the order passed by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in this regard or till such date on which all dues including interest thereof are paid, whichever is later, and during this period notwithstanding anything contained in sub-rule (4) of rule 3 of CENVAT Credit Rules, 2004, the assessee shall be required to pay excise duty for each consignment by debit to the account current and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow."

In the unamended rule there was no specific stipulation that if the amounts were not paid by the due date, the facility would be forfeited. But Rule 3-A of Rule 8 was specifically amended which is already reproduced hereinabove. This position is almost conceded in the writ petition. It is also not disputed that the petitioner was in default for the first time. Now the only question is whether the impugned order could have been passed without giving an opportunity of being heard to the petitioner. As is seen from the writ petition, it is conceded that the petitioner was in default, therefore even if a notice had been given to the petitioner, possibly he had no defence to make. The learned counsel for the respondent relies on judgments of the Supreme Court to canvass that there can be cases where before passing of an order hearing can be dispensed with. In *Viveka Nand Sethi Vs. Chairman, J & K Bank Ltd.* the Supreme Court held in para-22,

> "The principle of natural justice, it is trite, is no unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply."

In coming to this conclusion, the Supreme Court also relied on a judgment reported in *Gurjeewan Garewal (Dr.) Vs. Dr. Sumitra Dash* . It held,

> "the principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case."

Similarly in *Karnataka SRTC Vs. S.G. Kotturappa* the Supreme Court held,

> "The question as to what extent, principles of natural justice are required to be complied with would depend upon the fact situation obtaining in each case. The principles of natural justice cannot be applied in vacuum. They cannot be put in any straitjacket formula. The principles of natural justice are furthermore not required to be complied with when it will lead to an empty formality. What is needed for the employer in a case of termination of services of an employee is to apply the objective criteria for arriving at the subjective satisfaction. If the criteria required for arriving at an objective satisfaction stand fulfilled, the principles of natural justice may not have to be complied with, in view of the fact that the same stood complied with before imposing punishments upon the respondents on each occasion and, thus, the respondents, therefore could not have improved their stand even if a further opportunity was given."

Since the petitioner has admitted that he is in default and the rule provides for forfeiting the facility, therefore even a show cause notice would not have made a difference. The learned counsel for the petitioner, however, relies on a judgment of the Punjab and Haryana High Court reported in *Krishna Engineering Works Ltd. Vs. Union of India* which held that Rules 49 (1) (e) and 173 G (1) (e) of Central Excise Rules, 1944 had not given an impression that the rule is not required to be complied with before passing an order of forfeiture. In

the fact situation of the case the High Court found that notice should have been given. In para-19 it said,

> "The defence which the affected person may put forward in reply to the show cause notice cannot be visualized, but the possibility of giving a plausible explanation cannot, altogether, be ruled out. In a given case, the notice may show that no default has been committed in making payment of duty within the stipulated period. In another case, it may prove that the notice has not been issued by the competent authority. In yet another case, it may convince the authority concerned that the amount standing in its credit could be used for payment of duty. The defence offered by the noticee may not be accepted by the concerned authority, but there does not appear to be any reason or justification to exclude the applicability of the rules of natural justice from the scheme of amended Rules 49 and 173G of the Rules assuming that the noticee will have no defence explanation to offer."

In view of the judgments of the Supreme Court referred to above, we do not think that the petitioner had any explanation and as such there was no need to hear him before passing the impugned order as he all along maintained that he had committed default. The writ petition therefore deserves to be dismissed and is accordingly dismissed. No costs.

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BILAL NAZKI J.

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G.CHANDRAIAH J.

Dt. 9.6.2006

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